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No. 97-1448

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

JOHN RATELLE, Acting warden of California State Prison at Lancaster, and DANIEL E. LUNGREN, Attorney General of the State of California, *Petitioners*,

v.

LEE PERRY FARMER, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL, FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In his opposition to certiorari Farmer raises several new points in an attempt to dilute the question for review posed by Petitioners: Can a criminal defense attorney's informed trial tactic deprive a defendant of his constitutional right to the effective assistance of counsel?

He maintains his trial counsel Meyers failed to adequately investigate Huffman's confessions to other people besides Dorothy Hicks, namely Huffman's confessions to his own attorney Clarence Hewatt and to prison inmate Charles Nelson.

But with good reason the Ninth Circuit never held Farmer's trial attorney failed to adequately investigate Huffman's confessions to others. Hewatt testified in state court that he and Meyers talked about Huffman's confessions to Hewatt and that Meyers repeatedly asked Hewatt to testify about the confessions

at Farmer's original guilt phase trial. Hewatt refused Meyers' requests because of his concerns about the attorney-client privilege and losing the trust of other criminal defendants. (Penalty Retrial RT 3370-3374, 3430-3432, 3425, 3523, 4270, 4279, 4290-4291.) Prison inmate Charles Nelson testified he would never have come forward as a defense witness at Farmer's original guilt phase trial because of his fear of getting a "snitch jacket." His penalty retrial testimony of Huffman's jailhouse confession was less than compelling given Huffman's penchant for bragging about other crimes he may or may not have committed in order to pose as the toughest man in the tank. (Penalty Retrial RT 4499-4514.) The only witness willing to testify about Huffman's confessions during Farmer's original trial was Meyers himself. (Original Retrial RT 3909.) The Ninth Circuit did not find Meyers' investigation inadequate, candidly distinguishing its Farmer opinion from Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) on this basis. Appendix A-9.

Farmer also emphasizes that because Huffman described two burglaries to police, the second of which involved Farmer's shooting of Schmidt-Till while alone with Schmidt-Till in the apartment, impeachment with Huffman's statement would not have exposed Farmer to aider and abettor liability for felony-murder. But upon hearing Huffman's statement along with Dorothy Hicks Farmer's testimony describing in detail Farmer's motivation to burglarize the apartment, jurors choosing to believe only part of Huffman's confession or Dorothy Hicks-Farmer's defense testimony could have imputed felony-murder liability to Farmer even if they believed Huffman was the actual shooter. On the other hand, without Hicks-Farmer's testimony and impeachment with Huffman's statement, jurors had acquit Farmer if they believed Meyers' mistaken identity defense.

Farmer emphasizes Meyers did not bring an investigator or memorialize his own interviews with

Huffman. But Meyers was interviewing Huffman as a potential defense witness pursuant to the Farmer-Huffman plan hatched before the Farmer's trial. It was only because Huffman later backed out of the deal that Meyers decided he had to testify himself about the confessions at the original penalty phase. And in closing argument the prosecutor did not question Meyers' credibility; it was Huffman he branded as a liar. (Original Retrial, RT 4097, 4214-4220.) Even Huffman's own attorney, Clarence Hewatt, admitted taking no notes when he interviewed Huffman. (Penalty Retrial RT 3507.)

Farmer points to declarations he got penalty retrial jurors to sign suggesting he should get a new guilt phase trial. But the prosecutor got other statements from penalty retrial jurors containing these additional comments: jurors spent very little time discussing whether Huffman was accurate or bragging when he "confessed (Penalty Retrial CT 1288); most erroneously concluded Schmidt-Till "had to" have been in a confused mental state when he described the shooter notwithstanding a penalty phase stipulation that Schmidt-Till was lucid, designed in to exclude a graphic dispatch audio tape of his final words clearly proving his lucidity (Penalty Retrial CT 908-909, 1269, 1289; RT 232-268); jurors erroneously felt the name "Chuck" in another address phone book in the apartment referred to Huffman and erroneously considered information Schmidt-Till knew Huffman as the apartment maintenance man notwithstanding a limiting instruction that they not do so (Penalty Retrial CT 1269, 1288); they felt they had to be "absolutely certain" Farmer pulled the trigger to give him the death penalty and were not overly concerned about resolving conflicts in the evidence since such conflicts could be resolved with a life without possibility of parole verdict (Penalty Retrial CT 1288, 1291); one juror who expressed concerned that such a verdict would be used by the defense to get Farmer a new trial was assured by others this would not happen (Penalty

Retrial CT 1291-1292). Farmer's new counsel began his opening statement and closing argument at the penalty retrial by assuring jurors Farmer would spend the rest of his life in prison. (RT 3655, 5210.)

Notwithstanding Farmer's opposition to certiorari, this is a straightforward case ideal for certiorari. Farmer simply does not like the unsuccessful but informed trial tactic of his original trial counsel. This Court should grant certiorari and clearly state that an informed tactical choice made by trial counsel does not deprive a defendant of his Sixth Amendment right to counsel.

Dated: April 15, 1998.

Respectfully submitted,

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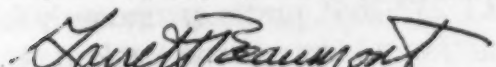

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